

***United States Court of Appeals
for the Second Circuit***



AMICUS BRIEF

NO. ~~17-1088~~ 77-4083

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE LONG ISLAND COLLEGE HOSPITAL,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition To Review And Set Aside A Decision
And Order Of The National Labor Relations Board

MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE ON BEHALF OF THE
AMERICAN HOSPITAL ASSOCIATION

and

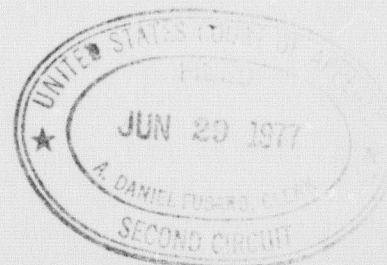
BRIEF AMICUS CURIAE ON BEHALF
OF THE AMERICAN HOSPITAL ASSOCIATION

RICHARD L. EPSTEIN
K. BRUCE STICKLER

Attorneys for the American
Hospital Association,
Amicus Curiae

Of Counsel:

Sonnenschein Carlin Nath &
Rosenthal
8000 Sears Tower
Chicago, Illinois 60606



MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE ON BEHALF OF THE
AMERICAN HOSPITAL ASSOCIATION

The American Hospital Association (hereinafter referred to as the "AHA") respectfully moves for leave to file a brief amicus curiae^{1/} in support of the position of The Long Island College Hospital, urging the Court to set aside an order of the National Labor Relations Board and to deny enforcement of the Board's order in The Long Island College Hospital, 228 NLRB No. 13 (1977).

The AHA states as follows:

1. The AHA is a non-profit association of more than 7,000 member institutions engaged in the delivery of health care. It is the largest association of health care institutions of its kind in the United States.

2. The decision of the National Labor Relations Board in this case, to apply its doctrine of comity to a New York State Labor Relations Board (hereinafter referred to as the "SLRB") certification of a hospital plant and engineering department amounts to an abdication of its statutory responsibility to "... decide in each case ... the unit appropriate for the purposes of collective bargaining..."^{2/}

^{1/} Pursuant to Rule 29, F.R.A.P., the AHA solicited the parties' consents to the filing of a brief amicus curiae. Counsel for the Petitioner and for the Respondent each gave his written consent (Exhibits A and B attached hereto).

^{2/} §9(b), 29 U.S.C. §159(b).

This very point was recently made by the Third Circuit:

"Thus the statute requires the Board to exercise its discretion as to an appropriate unit in each and every case. This responsibility can neither be delegated to nor discharged by a state agency where Congress has sought to create a national labor policy by vesting this discretion in a national board. LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board, 336 U.S. 18, 24-27 (1948). Here, however, the Board abdicated its required duty by accepting the PLRB determination without exercising its own mandated discretion. In so doing the Board overstep[ped] the law. Packard Motor Car Co., v. NLRB, supra at 491." Memorial Hospital of Roxborough v. NLRB, 545 F.2d 351, 360 (1976).

The Labor Board has refused to follow the holding of the Third Circuit in Memorial Hospital of Roxborough, in this case.^{3/} This is of vital concern to AHA's membership.^{4/}

Enforcement of the Board's Decision and Order would severely impede the responsibility and intent of the Board to fashion a uniform national policy in health care labor relations matters, and "would conflict with the federal pre-emption

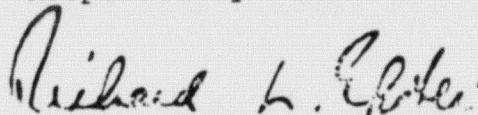
^{3/} "With all due respect for the views expressed by the Court of Appeals for the Third Circuit in its opinion in Memorial Hospital of Roxborough v. N.L.R.B., ... we respectfully adhere to the Board majority's opinion in that case, reported at 220 NLRB No. 73 (1975), until such time as the Supreme Court shall have passed on the matter." 228 NLRB No. 13, n.2 (citation omitted).

^{4/} Its membership includes, inter alia, the Petitioner herein, as well as thousands of hospitals, located in thirteen state jurisdictions whose laws regulated health care labor relations matters prior to Public Law 93-360 (August 24, 1974), or located in states where there was no adequate regulation whatsoever.

achieved by the new amendments."^{5/} Enforcement would also give judicial sanction to a Board policy (application of its comity doctrine) which would result in federally-approved fragmented bargaining units in the health care industry. This contravenes Congressional intent that "due consideration should be given by the Board to prevent proliferation of bargaining units in the health care industry."^{6/}

3. The matter at issue here, accordingly, transcends the interests of the particular parties involved. This case raises matters of recurring importance in the administration of the new health care amendments to the National Labor Relations Act. For these reasons, the AHA respectfully requests leave to present its views.

Respectfully submitted,



RICHARD L. EPSTEIN
K. BRUCE STICKLER

Attorneys for the American
Hospital Association

Of Counsel:

Sonnenschein Carlin Nath &
Rosenthal
8000 Sears Tower
Chicago, Illinois 60606

^{5/} San Diego Building Trades Council, et al., v. Garmon, 359 U.S. 236, 241-242 (1959). See also Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957).

^{6/} S. Rep. No. 93-766, 93d Cong., 2d Sess. 5 (1974).

NO. 77-4038

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE LONG ISLAND COLLEGE HOSPITAL,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition To Review And Set Aside A Decision
And Order Of The National Labor Relations Board

BRIEF AMICUS CURIAE ON BEHALF
OF THE AMERICAN HOSPITAL ASSOCIATION

RICHARD L. EPSTEIN
K. BRUCE STICKLER

Attorneys for the
American Hospital Association,
Amicus Curiae

Of Counsel:

Sonnenschein Carlin Nath &
Rosenthal
8000 Sears Tower
Chicago, Illinois 60606

INDEX

	<u>Page</u>
TABLE OF AUTHORITIES.....	iv
INTEREST OF AMICUS CURIAE.....	1
STATEMENT OF JURISDICTION.....	1
ARGUMENT.....	3
I. THE BOARD'S APPLICATION OF ITS COMITY DOCTRINE TO STATE ORDAINED BARGAINING UNITS IN THE HEALTH CARE INDUSTRY AMOUNTS TO AN ABDICATION OF ITS STATUTORY RESPONSIBILITY.....	3
II. THE BOARD'S APPLICATION OF ITS COMITY DOCTRINE TO STATE ORDAINED BARGAINING UNITS WHEN APPLIED TO HEALTH CARE INSTITUTIONS CONTRAVENES THE INTENT OF CONGRESS.....	8
A. The Congress Pre-Empted State Labor Relations Statutes Governing Health Care Institutions In Order to Promulgate A Uniform National Policy.....	8
B. Congressional Pre-emption Necessarily Includes Unit Determinations Made By Pre-existing State Agencies.....	11
C. The Board's Recognition of Bargaining Units In Health Care Institutions Which Evolved Under State Labor laws Violates The Congressional Mandate And Impedes The Formation Of A National Policy.....	13
CONCLUSION.....	17

TABLE OF AUTHORITIES

Page.

Cases

<u>Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Company,</u> 404 U.S. 157 (1971).....	5
<u>Bay City Medical Center,</u> 218 NLRB No. 100 (1975).....	14
<u>Bethlehem Steel Co. v. New York State Labor Relations Board,</u> 330 U.S. 767 (1947).....	16
<u>Garner v. Teamsters C & H Local Union,</u> 346 U.S. 485 (1953).....	12
<u>Guss v. Utah Labor Relations Board,</u> 353 U.S. 1 (1957).....	12, 13
<u>Jewish Hospital,</u> 223 NLRB No. 91 (1976).....	6
<u>Kaiser Foundation Hospital,</u> 219 NLRB No. 22 (1975).....	14
<u>Kansas City College of Osteopathic Medicine,</u> 220 NLRB No. 36 (1975).....	15
<u>LaCross Telephone Corporation v. Wisconsin Employment Relations Board,</u> 336 U.S. 18 (1949).....	15
<u>Memorial Hospital of Roxborough v. NLRB,</u> 545 F.2d 351 (1976).....	3, 4, 5
<u>Mercy Center,</u> 227 NLRB No. 265 (1977).....	6
<u>NLRB v. New Enterprise Stone and Lime Company,</u> 413 F.2d 117 (3rd Cir. 1969).....	5
<u>NLRB v. Sun Drug Co.,</u> 359 F.2d 408 (3rd Cir. 1966).....	5

	<u>Page(s)</u>
<u>Packard Motor Car Co. v. NLRB,</u> 220 U.S. 485 (1947).....	5
<u>Riverside Methodist Hospital,</u> 223 NLRB No. 168 (1976).....	6
<u>St. Francis Hospital,</u> 223 NLRB No. 213 (1976).....	6
<u>St. Joseph,</u> 224 NLRB No. 47 (1976).....	6
<u>St. Joseph's Hospital,</u> 221 NLRB No. 213 (1976).....	15
<u>St. Joseph Hospital & Medical Center,</u> 219 NLRB No. 161 (1975).....	14
<u>St. Vincent's Hospital,</u> 227 NLRB No. 70 (1976), petition for review docketed No. 77-1027 (3rd Circuit).....	6
<u>San Diego Building Trades Council,</u> et al. v. Garmon, 359 U.S. 236 (1959).....	12
<u>San Jose Hospital & Health Center,</u> 228 NLRB No. 6 (1977).....	6
<u>Shriners Hospital,</u> 217 NLRB No. 138 (1975).....	6
<u>The Long Island College Hospital,</u> 228 NLRB No. 13 (1977).....	4
<u>Weber v. Anheuseur-Busch, Inc.,</u> 348 U.S. 468 (1955).....	12
<u>West Suburban Hospital,</u> 224 NLRB No. 100 (1976).....	6
<u>Yale-New Haven Hospital,</u> 219 NLRB No. 37 (1975).....	14
<u>Youngdahl v. Rainfair,</u> 355 U.S. 131 (1957).....	12

Congressional Record

120 Cong. Rec. S6942 (daily ed. May 2, 1974).....	9, 10
120 Cong. Rec. S6991 (daily ed. May 2, 1974).....	9
120 Cong. Rec. S7311 (daily ed. May 7, 1974).....	13
120 Cong. Rec. H4597-4599 (daily ed. May 30, 1974).....	9
120 Cong. Rec. H4598 (daily ed. May 30, 1974).....	9
120 Cong. Rec. H6396 (daily ed. July 11, 1976).....	12

Senate and House Hearings

Hearings on H.R. 1236 before a Special Subcommittee on Labor of the Committee on Education and Labor, House of Representatives, 93d Cong., 1st Sess., 86-87 (April 19, 1973).....	8
State of Undersecretary of Labor Richard Schubert on extending Taft-Hartley to nonprofit hospitals before the Labor Subcommittee of the Senate Committee on Labor and Public Welfare as reported in Daily Labor Report No. 149, Sec. D (August 2, 1973).....	11

BRIEF AMICUS CURIAE ON BEHALF
OF THE AMERICAN HOSPITAL ASSOCIATION

This brief amicus curiae is filed on behalf of the American Hospital Association (AHA) contingent upon the Court's granting the foregoing motion for leave to file a brief amicus curiae.

INTEREST OF THE AMICUS CURIAE

The interest of the AHA is set forth in its annexed motion for leave to file a brief amicus curiae.

STATEMENT OF JURISDICTION

The Long Island College Hospital (hereinafter "the Hospital"), pursuant to Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, et seq.), seeks review of a Decision and Order of the National Labor Relations Board, issued on February 9, 1977 and reported at 228 NLRB No. 13 (1977). That decision by former Chairman (now Member) Betty Southard Murphy and former Member (now Chairman) John H. Fanning and Member Howard Jenkins, Jr., affirmed the rulings, findings and conclusions and recommended order contained in Administrative Law Judge Michael O. Miller's Decision in The Long Island College Hospital, Case No. 29-CA-4562.* The Administrative

* Both the Board's Decision and Order and the Administrative Law Judge's Decision are reproduced in the Appendix. AHA has not received a copy of the official Appendix for reference purposes.

{

Law Judge found that the Hospital's refusal to bargain with the Union in a maintenance of plant and engineering department unit which was found appropriate by the New York State Labor Relations Board, under state law, violated Sections 8(a)(5) and (1) of the Act. This Court has jurisdiction of the proceedings as the unfair labor practices alleged to have been committed occurred in Brooklyn, New York within this judicial circuit, and the Hospital is located in and provides health services within this circuit.

ARGUMENT

I. THE BOARD'S APPLICATION OF ITS COMITY DOCTRINE TO STATE ORDAINED BARGAINING UNITS IN THE HEALTH CARE INDUSTRY AMOUNTS TO AN ABDICATION OF ITS STATUTORY RESPONSIBILITY.

On October 18, 1976 the U.S. Court of Appeals for the Third Circuit held that the National Labor Relations Board "abdicated its required duty" by granting comity to a hospital bargaining unit determination of the Pennsylvania Labor Relations Board, Memorial Hospital of Roxborough v. NLRB, 545 F.2d 351, 360 (3rd Cir. 1976).^{1/}

The Board has chosen in this case however, to ignore the Third Circuit's Roxborough decision, and instead, to

^{1/} The Third Circuit stated,

"§9(a) provides that [r]epresentatives designated or selected for the purposes of collective bargaining ... in a *unit appropriate* for such purposes, shall be the exclusive representative of all the employees in such unit (Emphasis added). Although this section is silent as to the manner by which the appropriateness of a unit is to be determined, the following section is quite specific. Section 9(b) provides that

[t]he Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof... . (Emphasis added.)

(continued on next page)

continue to apply comity to state certifications of health care institution bargaining units.

"With all due respect for the views expressed by the Court of Appeals for the Third Circuit in its opinion in Memorial Hospital of Roxborough v. N.L.R.B., ... we respectfully adhere to the Board majority's opinion in that case, reported at 220 NLRB No. 73 (1975), until such time as the Supreme Court shall have passed on the matter." The Long Island College Hospital, 228 NLRB No. 13, n.2 (1977) (citation omitted).

We submit that this Court, like the Third Circuit before it, (and other courts wherein this issue may yet be presented for judicial review) should treat the Board's grant of comity to state ordained bargaining units in the health care industry as an abdication of its statutory duty.

The Board's determination of unit appropriateness "involves of necessity a large measure of informed discretion,

1/
(continued from preceding page)

29 U.S.C. §159(b). Congress has thus mandated Board determination in each case of the unit appropriate for collective bargaining. Thus the statute requires the Board to exercise its discretion as to an appropriate unit in each and every case. This responsibility can neither be delegated to nor discharged by a state agency where Congress has sought to create a national labor policy by vesting this discretion in a national board. LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board, 336 U.S. 18, 24-27, 69 S.Ct. 379, 93 L.Ed. 463 (1948). Here, however, the Board abdicated its required duty by accepting the PLRB determination without exercising its own mandated discretion. In so doing the Board overstep[ped] the law. Packard Motor Car Co. v. NLRB, *supra*, 330 U.S. at 491, 67 S.Ct. 789. This conclusion follows not only from the text of the NLRA, but also from the legislative history of the non-profit hospital amendments." 545 F.2d at 360.

and the decision of the Board ... is rarely to be disturbed.",
Packard Motor Car Co. v. NLRB, 330 U.S. 485, 491 (1947).

"But the Board's powers in respect of unit determinations are not without limits, and if its decision 'oversteps the law' [Packard v. NLRB, supra, at 491], it must be reversed."

Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Company, 404 U.S. 157, 171-172 (1971). See also, Memorial Hospital of Roxborough, supra, at 360, 361. If it is true that "[t]he determination of the appropriate unit is a difficult and complex decision ..."^{2/}, and that health care industry unit determinations require special considerations^{3/}, then, we submit, the Board's granting comity to state health care bargaining unit decisions "oversteps the law."

This argument is even more compelling upon a review of the facts of the instant case, the irregular proceedings before the state agency and the admitted conflict between the federal and the New York State labor laws.

- ° Thus, eleven years have elapsed between the New York State Labor Relations Board certification of the bargaining unit of maintenance of plant and engineering department employees and the NLRB's grant of comity to that determination.

^{2/} NLRB v. New Enterprise Stone and Lime Company, 413 F.2d 117, 119 (3rd Cir. 1969); NLRB v. Sun Drug Co., 359 F.2d 408, 412 (3rd Cir. 1966).

^{3/} "Congress thus interjected a special consideration into the Board's determination of appropriate units in the health care industry. ... However, in granting comity to the unit determination of the PLRB the Board has [not] ... complied with the Congressional admonition that it consider proliferation of units in the health care industry." Memorial Hospital of Roxborough v. NLRB, 545 F.2d at 361.

- ° The Long Island College Hospital's changes in structure, organization, operation, etc. have been substantial and significantly affect the composition of the bargaining unit. (See Petitioner's brief, generally).
- ° The SLRB's unit determination was made in 1964 pursuant to a state statute entirely "at odds" with the Taft-Hartley Act and the Congressional admonition against proliferation of bargaining units in the health care industry.^{4/}

Moreover, the Board has had an especially difficult time in defining appropriate health care industry bargaining units that include maintenance and plant engineering department employees.^{5/} Thus, obedience to the statutory requirement to

^{4/} Compare the Administrative Law Judge's decision herein,

"I therefore conclude that such differences as may exist between the National Labor Relations Act and the New York State Labor Relations Act do not render comity unwarranted. The statutes generally and as applied by the SLRB in this case are not inimical." (ALJ Decision, slip op. 9, lines 6-9)

to that of the NLRB in a recent case commenting upon the same New York statute,

"We attach little weight to the New York history in view of a state statute, obviously at odds with the health amendments' policy against proliferation of units..." San Jose Hospital & Health Center, 228 NLRB No. 6 (1977).

^{5/} Board members are in disagreement as to the appropriate hospital bargaining unit which includes these employees. Thus, sometimes they find appropriate a service and maintenance unit, Shriners Hospital, 217 NLRB No. 138 (1975); Riverside Methodist, 223 NLRB No. 168 (1976); Jewish Hospital, 223 NLRB No. 91 (1976); St. Joseph, 224 NLRB No. 47 (1976); sometimes the Board finds appropriate a maintenance department unit, West Suburban Hospital, 224 NLRB No. 100 (1976); St. Francis Hospital, 223 NLRB No. 213 (1976); sometimes the Board has found other units appropriate, St. Vincent's, 227 NLRB No. 70 (1976), petition for review docketed No. 77-1027 (3rd Circuit); Mercy Center, 227 NLRB No. 265 (1977).

exercise its discretion "in each case" is even more critical here. Nevertheless, the Board's announced policy in effect ignores the Act's statutory prescription.

II. THE BOARD'S APPLICATION OF ITS COMITY DOCTRINE TO STATE ORDAINED BARGAINING UNITS WHEN APPLIED TO HEALTH CARE INSTITUTIONS CONTRAVENES THE INTENT OF CONGRESS.

- A. The Congress Pre-empted State Labor Relations Statutes Governing Health Care Institutions In Order to Promulgate A Uniform National Policy.

Congressional enactment of the health care amendments included a specific intent to pre-empt state^{6/} labor regulation of health care institutions. Congress required pre-emption in order to obtain a reasonable degree of uniformity among the fifty states to insure continuity in the delivery of health care.

Congressman Thompson, a co-sponsor of the House bill, in early hearings, stated:

"The pattern of the 11 or 12 state laws varies greatly.... One has compulsory arbitration. Michigan has fact-finding. Pennsylvania has something else. It is a crazy quilt-pattern, and it ought to be uniform."^{7/}

Congress' fidelity toward development of a uniform national policy was prevalent throughout the legislative history. Thus,

^{6/} Approximately thirteen states had labor laws regulating health care institutions: Pennsylvania, New York, Michigan, Minnesota, Connecticut, Wisconsin, Massachusetts, Oregon, Montana, Hawaii, Kansas, Washington and Colorado.

^{7/} Hearings on H.R. 1236 before a Special Subcommittee on Labor of the Committee on Education and Labor, House of Representatives, 93d Cong., 1st Sess., 86-87 (April 19, 1973).

Congress deliberately chose not to cede jurisdiction to states which had their own statutory scheme governing health care labor relations.^{2/} Congress, moreover, removed from the thirteen states which had had laws, the authority of their labor relations agencies to function in the health care field. Congress' reasons for total pre-emption are clear, as evidenced by the following statements during the debate on a proposed amendment to the bills which would have done otherwise:

Congressman Thompson:

"One of the primary reasons for the Bill before us is to remove the artificial distinction that exists between employees of proprietary and non-profit hospitals. The effect of this amendment would be to create another and still artificial distinction in that the nonprofit hospital employees of 13 states could again have their collective bargaining relationship governed by different laws.

"Mr. Chairman, potentially we have in those 13 states employees with different rights from those of other employees doing the same work across state lines."^{9/}

Senator Taft:

"I think it is important, however, to have a national approach in view of the problems we have had and that have varied widely through the country. There may be a very positive situation in the Senator's own State which does

^{8/} This choice was made notwithstanding two amendments offered by Congressman Quie (120 Cong. Rec. H4597-4599 [daily ed. May 30, 1974]) and Senator Mondale (120 Cong. Rec. S6942, S6991 [daily ed. May 2, 1974]) which would have provided for Labor Board cession.

^{2/} Legislative History, p. 317; Vol. 120 Cong. Rec., H4598 (daily ed. May 30, 1974).

not indicate at the present time any need for a national law, but I think on balance a national approach is desirable."^{10/}

The need for uniform federal health care regulation was also widely expressed by a number of witnesses in testimony before the special Congressional subcommittees. Undersecretary of Labor Richard Schubert, who testified on behalf of the Administration in support of removing the exemption, testified as to the importance of uniformity:

"The Congress could enact special NLRB provisions allowing states to regulate labor-management relations for the health care industry, but we have serious reservations about this approach. Those who advocated departures from the basic policies of the NLRA must carry the burden of showing that such deviations would benefit employees, employers and the public. We are not convinced that this would be true in the health care field.

"Giving states only partial jurisdiction over health care institutions' labor relations might well be unworkable, for labor relations regulation tends to be an interrelated process. Decisions in one area may depend on facts found in another context. For example, NLRB unfair labor practice cases have been raised on facts and findings made in representation proceedings. Thus, if decisions made by a state agency in one context were later examined in another context by the NLRB, confusing jurisdiction overlaps would no doubt occur. Further, the Board's successful experience with health care institutions similar to nonprofit hospitals strongly suggest that such an effort is unnecessary. In the health care industry, as elsewhere, a uniform national approach prevents inequities of treatment among states. Such inequities could become a source of unwarranted friction and resentment. Departing from this pattern for a particular industry creates a troublesome precedent. Therefore, despite our reluctance to pre-empt state provisions that may have been successful, we believe

^{10/} Legislative History, pp. 117-118; Vol. 120 Cong. Rec., S6942 (daily ed. May 2, 1974).

that the need for a consistent national labor policy is of overriding importance."^{11/} (emphasis added)

B. Congressional Pre-emption Necessarily Includes Unit Determinations Made By Pre-existing State Agencies.

In the Congress' admonition to the Labor Board to avoid undue proliferation of bargaining units in the health care industry,^{12/} we submit that Congress intended also that pre-existing state unit determinations, like the state statutory scheme under which they arose, be pre-empted in favor of Board determination of appropriate bargaining units which comport with the Congressional mandate. We suggest this is precisely what Congress had in mind when it debated the Conference Report on S.3203:

"Mr. QUIE. Mr. Speaker, if the gentlemen will yield further, what is the application of the legislation on hospitals and unions presently engaged in bargaining under State laws, or even where no law, State or Federal, had previously applied to them?

^{11/}

Statement of Undersecretary of Labor Richard Schubert on extending Taft-Hartley to nonprofit hospitals before the Labor Subcommittee of the Senate Committee on Labor and Public Welfare as reported in Daily Labor Report No. 149, Sec. D (August 2, 1973).

^{12/}

"Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry. In this connection, the Committee notes with approval the recent Board decisions in Four Seasons Nursing Center, 208 NLRB No. 50, 85 LRRM 1093 (1974), and Woodland Park Hospital, 205 NLRB No. 144, 84 LRRM 1075 (1973), as well as the trend toward broader units enunciated in Extendicare of West Virginia, 203 NLRB No. 170, 83 LRRM 1242 (1973)." ^{1/}

(continued on next page)

"Mr. THOMPSON of New Jersey. To attempt to answer your questions, it seems that those hospitals presently engaged in bargaining will have to meet the requirements of the National Labor Relations Act when this legislation becomes effective. For instance, had a hospital recognized a minority union, it is contemplated that the hospital could no longer continue recognition. It would seem the better practice that if either party questioned the validity of the recognition or the appropriate unit, they should file a representation petition with the NLRB."^{13/} (emphasis added)

The United States Supreme Court's treatment of issues of pre-emption arising under the National Labor Relations Act is pertinent.^{14/} The Supreme Court has declared,

"[t]he extent to which the variegated laws of the several States are displaced by a single, uniform, national rule has been a matter of frequent and recurring concern.... In determining the extent to which state regulation must yield to subordinating federal authority, we have been concerned with delimiting areas of potential conflict; potential conflict of rules of law, of remedy, and of administration." San Diego Building Trades Council v. Garmon, 359 U.S. 236, 241-242 (1959).

Were state-created bargaining units, like the one in the instant case, to survive Congressional pre-emption, the

^{12/}

(continued from preceding page)

"^{1/} By our reference to Extendicare, we do not necessarily approve all of the holdings of that decision." (Senate Report No. 93-766, 93d Cong., 2d Sess. 5, [1974]; House of Representatives Report No. 93-1051, 93d Cong., 2d Sess. 6-7, [1974]).

^{13/}

Legislative History, p. 388; 120 Cong. Rec. H6393 (daily ed. July 11, 1974).

^{14/}

San Diego Building Trades Council, et al. v. Garmon, supra; Guss v. Utah Labor Relations Board, supra; Youngdahl v. Rainfair, 355 U.S. 131 (1957); Garner v. Teamsters C & H Local Union, 346 U.S. 485 (1953); Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955).

Board and the courts would be presented with actual, not simply potential, conflicts of administration. The national labor policy and intent of Congress embodied in the amendments would be thwarted. In short, we respectfully submit that by the manner in which "Congress has expressed its judgment in favor of uniformity",^{15/} pre-emption of state bargaining units has in effect occurred.

- C. The Board's Recognition Of Bargaining Units In Health Care Institutions Which Evolved Under State Labor Laws Violates The Congressional Mandate And Impedes The Formation Of A National Policy.

We must be mindful that Public Law 93-360,

"marks the first time in the history of the National Labor Relations Act that a particular occupational group has been singled out for special consideration. This legislation clearly reflects the Congressional recognition that health care is significantly different enough from other aspects of the economy to merit special protections and procedures under the Act."^{16/}

In this vein, and as part of that special concern, Congress cautioned the Board to prevent proliferation of bargaining units in the health care industry.^{17/}

^{15/} Guss v. Utah, supra, at 10-11.

^{16/} Remarks of Senator Taft in the debates over S.3203, Legislative History, p. 256, 120 Cong. Rec. S7311 (daily ed. May 7, 1974).

^{17/} See Note 12, supra, and accompanying text, p. 12.

Nonetheless, the Board, by granting recognition to state certified bargaining units which existed prior to the Act, is threatening to erode the Congress' intent altogether, and instead, to "create potential frustration of national purposes." San Diego Building Trades Council v. Garmon, supra, at 244.

Where the Board had adhered to pre-existing unit determinations, it has done so on one of two theories: either by outright recognition of the history of the bargaining unit, ^{18/} or by applying its doctrine of

^{18/}

Witness the following representative decisions:

Bay Medical Center, Inc., 218 NLRB No. 100 (1975), where the Board carved out LPNs from a unit of all other technical employees working at two facilities because LPNs at one facility had a history of bargaining in a unit certified by the State of Michigan.

Yale-New Haven Hospital, 219 NLRB No. 37 (1975), where dietary employees were excluded from an overall service and maintenance unit because of their separate bargaining history pursuant to a State Board certification and the parties' agreement to exclude them.

St. Joseph Hospital & Medical Center, 219 NLRB No. 161 (1975), where the Board upheld a unit of maintenance employees because of the long collective bargaining relationship where no state law existed.

Kaiser Foundation Hospitals, 219 NLRB No. 22 (1975), where the Board permitted two separate units of registered nurses working at an adjoining hospital on the basis of unique history of bargaining in the unit of clinic nurses only, where no state law existed.

(continued on next page)

comity.^{19/} Both routes result in the same phenomenon--the Congressional effort and intent to make a uniform broad unit policy is blunted by the Board doing indirectly with units that which it may not do directly. To permit this practice of the Board to persist will result in a continuation of the crazy quilt-pattern of the pre-Act state-ordained bargaining units.

Returning to the United States Supreme Court, that Court addressed itself also to the specific issue of the status of a state labor board certification vis-a-vis what is referred to as national labor policy.

In La Crosse Telephone Corporation v. Wisconsin Employment Relations Board, 336 U.S. 18 (1949), the Court held that a state board certification of a unit in an industry within the jurisdiction of the National Labor Relations Act must defer to federal supremacy. The Court reasoned that,

"[when] the state board puts its imprimatur on a particular group as collective bargaining agent of employees, it freezes into a pattern that which the federal act has left fluid. In

^{18/} (continued from preceding page)

Kansas City College of Osteopathic Medicine, 220 NLRB No. 36 (1975), where the Board carved out a separate unit of powerhouse employees because, in part, "other service and maintenance employees with whom the powerhouse employees might be joined in an overall service and maintenance unit are already represented by other labor organizations."

^{19/} St. Joseph's Hospital, 221 NLRB No. 213 (1976) where the Board applied its comity doctrine to a decision of the State of Minnesota to include admitting clerks in a bargaining unit which excluded many classifications of non-professionals.

practical effect the true measure of conflict between the state and federal scheme of regulation may not be found only in the collision between the formal orders that the two boards may issue. We know that administrative practice also disposes of cases in which no order has been entered. Disposition of controversies on an administrative as distinguished from a formal basis will often reflect the attitudes of the National Board which have not been reduced to orders in those specific cases. A certification by a state board under a different or conflicting theory of representation may therefore be as readily disruptive of the practice under the federal act as if the orders of the two boards made a head-on collision. These are the very real potentials of conflict which lead us to allow supremacy, to the federal scheme even though it has not yet been applied in any formal way to this particular employer."^{20/} (emphasis added)
336 U.S. at 25-26.

In sum, Board development of a uniform national approach to appropriate units in the newly regulated health care industry requires that it not apply its comity doctrine to pre-existing state health care decisions.

^{20/}

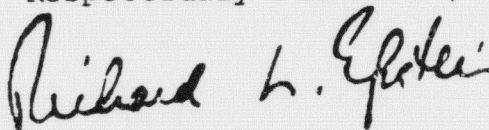
See also Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767 (1947), where the Supreme Court ruled that a state labor board was powerless to certify a foremen bargaining unit when the National Board's policy was to decline recognition to such units. It is this kind of conflict between the prior state regulation of health care institution bargaining units and the federal scheme which must be avoided.

CONCLUSION

The participation of the American Hospital Association in this proceeding reflects the concern of the health care industry about the Board's development of appropriate bargaining units in the newly covered industry. It is the desire of the industry that the Board analyze the facts of each case in light of the policies enunciated by Congress in the accompanying Committee Report (Note 12, supra) and in the debates on the floor of the House and Senate (pp. 8-12). The Board's announced policy of granting comity to state ordained bargaining units however, is at variance with the policies enunciated by Congress and its statutory responsibility.

For all of the reasons described above, and for those set forth by the Petitioner, this Court should set aside and deny enforcement to the Decision and Order of the Board.

Respectfully submitted,



RICHARD L. EPSTEIN
K. BRUCE STICKLER

Attorneys for the American
Hospital Association,
Amicus Curiae

Of Counsel:

Sonnenschein Carlin Nath &
Rosenthal
8000 Sears Tower
Chicago, Illinois 60606

EXHIBIT A

KELLEY DRYE & WARREN

350 PARK AVENUE

NEW YORK 10022

TELEPHONE (212) 752-5800

CABLE "LAWYERLY"

TELEX 12369

ALFRED W. ROBERTS
COUNSEL

FRANKLIN B. BENKARD
WILLIAM C. BLIND
LEONARD A. BLUE
PAUL R. BRENNER
BRIAN CHRISTALDI
RICHARD J. CONCANNON
HEWITT A. CONWAY
JOHN J. COSTELLO
G. CLARK CUMMINGS
EUGENE T. D'ABLEMONT
JOHN W. DRYE, JR.
ROBERT EHRENBARD
SAMUEL D. FORTENBAUGH, III
B. HARRISON FRANKEL
MARTIN D. HEYER
DUD. GEO. HOLMAN
J. QUINCY HUNSICKER, JR.
LELAND J. MARKLEY
CHARLES OECHELE
THEODORE PEARSON
EDWARD ROBERTS, III
WILLIAM S. RUBINSTEIN
TERRANCE W. SCHWAB
FREDERICK T. SHEA
ALBERT J. WALKER
CHAUNCEY L. WALKER
LOUIS B. WARREN
HARVEY FOLKS ZIMAND

May 11, 1977

Richard L. Epstein, Esq.
Sonnenschein Carlin Nath & Rosenthal
8000 Sears Tower
Chicago, Illinois 60606

Re: The Long Island College Hospital
v. NLRB, Second Circuit Docket
No. 77-4083

Dear Sirs:

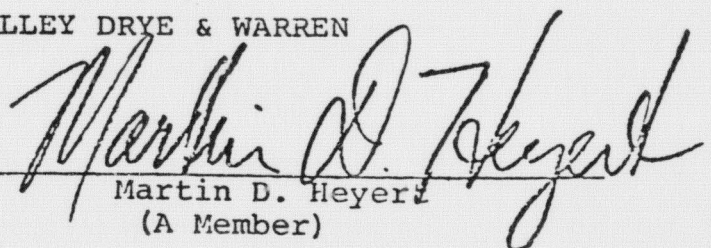
We represent The Long Island College Hospital,
the Petitioner in the case referred to above.

In accordance with Rule 29 of the Federal Rules
of Appellate Procedure, we consent to the American
Hospital Association participating and filing briefs
amicus curiae in this case.

Very truly yours,

KELLEY DRYE & WARREN

By


Martin D. Heyer
(A Member)

MDH:jf

cc: A. Daniel Fusaro, Esq.

EXHIBIT B



NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

May 20, 1977

Richard L. Epstein, Esquire
Sonnenschein, Carlin, Nath
& Rosenthal
8000 Sears Tower
Chicago, Illinois 60606

Re: No. 77-4083 -- Long Island College Hospital
v. N.L.R.B. (C.A. 2)
Board Case No. 29-CA-4562

Dear Mr. Epstein:

The Board has no objection to your request that the American Hospital Association be permitted to participate as amicus curiae in this case.

Very truly yours,

Elliott Moore,
Deputy Associate General Counsel

By Allison W. Brown Jr.
Allison Brown, Attorney

cc. A. Daniel Fusaro, Clerk,
United States Court of
Appeals for the Second Circuit
Foley Square
New York, New York 10007

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing were served by certified mail, return receipt requested on June 24, 1977 to the following persons:

Mr. Elliott Moore
Mr. Allison W. Brown, Jr.
Ms. Madge Jefferson
Office of the General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue
Washington, D.C. 20570

Mr. Roger J. Karlebach
Kelley Drye & Warren
350 Park Avenue
New York, New York 10022

